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SENATE

REPORT
101-288

AMENDING THE CLAYTON ACT

MAY 14 (legislative day, APRIL 18) 1990.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 996]

The Committee on the Judiciary, to which was referred the bill (S. 996) to amend the Clayton Act, as amended, having considered the same, reports favorably thereon and recommends that the bill do pass.

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I. PURPOSE OF BILL

S. 996 amends section 4A of the Clayton Act to provide for treble damages for the United States when it is injured as a result of conduct that violates the antitrust laws.

Under current law, the United States may recover damages equal to the actual amount of its injury under section 4A of the Clayton Act, 15 U.S.C. 15a. Businesses and individuals, however, are entitled to recover three times the amount of damages they suffer as a result of any antitrust violation. This disparity in the treatment of two sets of plaintiffs has a perverse effect, and may be contributing to a disturbing level of fraud against the Government.

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Because the penalty for victimizing the Government through means of an unlawful conspiracy is substantially less than the penalty for victimizing others, the Government becomes an easy target for price-fixing, bid-rigging and market allocation schemes that cost taxpayers millions of dollars every year. The committee intends to elevate antitrust crimes against the Government to the same level as crimes against other citizens.

II. History of Legislation

S. 996 was introduced by Senator Metzenbaum on May 16, 1989. A hearing on the bill was held on July 25, 1989. On March 22, 1990, with a quorum present, by voice vote, the Committee on the Judiciary unanimously ordered the bill favorably reported. Senator Kohl was added as a cosponsor of the bill as passed by the committee.

III. Discussion

Congress authorized suits for damages by the United States in 1955 in an amendment to the Clayton Act. Section 4A of the Clayton Act permits the United States to recover damages whenever the United States is injured, for instance when purchasing goods or services, by conduct that violates any antitrust law. The provision was introduced in response to a Supreme Court ruling in *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), that Congress did not intend to include the United States as a "person" entitled to treble damages for antitrust injuries. While section 1 of the Sherman Act as originally introduced authorized damages suits by the United States, the act[illegible] committee to omit this section and provide only criminal and equitable remedies for the Government.

The 1955 amendment limited damages available to the United States to actual damages. While acknowledging that the United States is a purchaser of substantial size, the Senate report concluded that the United States did not need the incentive of treble damages that were available to private litigants—

> so that private persons will be encouraged to bring actions which, though brought to enforce a private claim, will nonetheless serve the public interest in the enforcement of the antitrust laws. * * * The United States, of course, is amply equipped with the criminal and civil process with which to enforce the antitrust laws.

(S. Rep. No. 619, 84th Cong., 2d Sess. (1955).)

This line of reasoning ignores the tremendous deterrent value of treble damage actions, regardless of the status of the plaintiff. Treble damage actions may in fact be the only effective deterrent of abusive behavior given the reluctance of courts to impose jail sentences or stiff fines on individuals and corporations convicted of violating the antitrust laws. For example, according to Department of Justice statistics, in 1989, less than half of the individuals convicted of criminal antitrust violations were sentenced to jail, and of those serving jail sentences, the average time served was less than 8 months.

Moreover, there are more investigations into procurement fraud today than there were only 3 years ago. In 1986, the Department of Justice had 20 grand juries investigating allegations of price-fixing and bid-rigging on Government contracts; in 1989, there were 40 grand jury investigations. This increase is in spite of the well-known per se rules against this egregious conduct. Clearly, penalties are inadequate to reduce these economic crimes to an acceptable level. According to Assistant Attorney General Rill, this has contributed to the large number of grand jury investigations into government procurement fraud:

> The United States needs to put in place a strong disincentive that will discourage businesses from entering into price-fixing and bid-rigging conspiracies directed against the Federal Government. It makes little sense to have an enforcement system that makes the United States a less risky and thus more profitable target for antitrust violations than private parties, but that is what the current system provides.

Testimony of James F. Rill, Assistant Attorney General, Antitrust Division, Department of Justice, before the Committee on the Judiciary, Jurly 25, 1989.

IV. Text of S. 996 as Amended

[101st Cong., 1st Sess.]

A BILL To amend the Clayton Act regarding damages for the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Government Remedies Improvement Act of 1989".

TREBLE DAMAGES FOR THE UNITED STATES

Sec. 2. Section 4A of the Clayton Act (15 U.S.C. 15a), is amended by striking out "actual" and inserting in lieu thereof "threefold the".

V. Section-by-Section Analysis

Section 1: Section 1 states the short title of this legislation: the "Government Remedies Improvement Act of 1989."

Section 2: Section 2 amends Section 4A of the Clayton Act (15 U.S.C. 15a) by striking the word "actual" and inserting in lieu thereof the words "threefold the".

VI. Estimated Cost of Legislation

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 29, 1990.

Hon. JOSEPH R. BIDEN, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 996, the Government Remedies Improvement Act of 1989, as ordered reported by the Senate Committee on the Judiciary, March 22, 1990. We estimate that no cost to the federal government or to state or local governments would result from enactment of this bill. While this bill could result in increased receipts to the federal government, CBO has no basis for predicting any such increased receipts.

S. 996 would increase the maximum amount that the United States could recover in damages for certain violations of the Clayton Act. Currently the United States is limited to actual damages; S. 996 would increase this limit to triple damages.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 226-2860.

Sincerely,

ROBERT F. HALE
(For Robert D. Reischauer.)

VII. REGULATORY IMPACT STATEMENT

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee has concluded that the act establishes no new regulatory scheme and, therefore, will have no adverse impact.

VIII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of the rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 996, as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in Roman);

UNITED STATES CODE

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TITLE 15—COMMERCE AND TRADE

CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

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CLAYTON ACT

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§ 15. Suits by Persons Injured

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonably attorney's fee.

§ 15a. Suits by United States

Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefore in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover [actual] *threefold the* damages by it sustained and the costs of suit.

IX. Vote of the Committee

On March 22, 1990, with a quorum present, by voice vote, the Committee on the Judiciary ordered S. 996, as amended, favorably reported.

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